Dale M. Cendali (DC 2676)
Johanna Schmitt (JS 2125)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
Tel: (212) 326-2000
Fax: (212) 326-2061

Attorneys for Defendant Electronic Arts Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EMI APRIL MUSIC INC., EMI BLACKWOOD MUSIC INC., EMI UNART CATALOG INC., and EMI VIRGIN SONGS, INC.,	
Plaintiffs,	CASE NO. 04 CV 03065 (LAP) ECF Case
v.	
ELECTRONIC ARTS INC.,	DEFENDANT ELECTRONIC ARTS INC.'S ANSWER TO PLAINTIFFS' AMENDED COMPLAINT
Defendant.	

Defendant Electronic Arts Inc. ("EA" or "Defendant"), by and through its attorneys O'Melveny & Myers LLP, hereby responds to the Amended Complaint of EMI April Music Inc., EMI Blackwood Music Inc., EMI Unart Catalog Inc., and EMI Virgin Songs, Inc. (collectively, "EMI" or "Plaintiffs") as follows:

NATURE OF THE ACTION

1. Defendant denies the allegations contained in paragraph 1, but admits that Defendant is the world's leading independent developer and publisher of interactive entertainment software for personal computers and advanced entertainment systems. Defendant also admits that Defendant has released and currently sells the following games: *Madden NFL*

2004, *NASCAR Thunder 2004*, *Tiger Woods PGA Tour 2004*, *NHL 2004, NBA Live 2004, MVP Baseball 2004*, *EA SPORTS Fight Night 2004*, *FIFA 2004, Need for Speed: Underground;* and *NFL Street*. Defendant also admits that these games incorporate certain musical compositions that are at issue in this litigation.

2. Defendant denies the allegations contained in paragraph 2, but admits it has released and currently sells the following games: *Madden NFL 2004, NASCAR Thunder 2004, Tiger Woods PGA Tour 2004, NHL 2004, NBA Live 2004, MVP Baseball 2004, FIFA 2004, Need for Speed: Underground; SSX: Volume 3*; and *NBA Live 2003*. Defendant also admits that these games incorporate certain musical compositions that are at issue in this litigation.

3. Defendant states that the allegations contained in paragraph 3 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

THE PARTIES

4. Defendant denies knowledge or information sufficient to form belief as to the truth of the allegations contained in paragraph 4, and on that basis, denies the allegations.

5. Defendant admits the allegations contained in the first two sentences in paragraph 5. Defendant also admits that it has international subsidiaries located throughout the world that are involved in the marketing, distribution and/or sale of EA products. Except as admitted, Defendant denies the allegations in paragraph 5.

6. Defendant denies the allegations contained in paragraph 6, but admits that Defendant posted revenues over $2.5 billion for fiscal year 2003. Defendant further admits that more than 22 EA game titles sold over 1 million units in fiscal year 2003.

JURISDICTION AND VENUE

7. Defendant states that the allegations contained in paragraph 7 are conclusions of law as to which no response is necessary.

8. Defendant states that the allegations contained in paragraph 8 are conclusions of law as to which no response is necessary.

9. Defendant states that the allegations contained in paragraph 9 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

10. Defendant states that the allegations contained in paragraph 10 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

FACTUAL BACKGROUND

11. Defendant denies the allegations contained in paragraph 11, but admits that musical compositions are often included in videogames and that music publishers typically charge only nominal licensing fees for use of musical compositions in videogames, or provide use of the compositions *gratis*.

12. Defendant denies the allegations contained in paragraph 12, but admits that it created "EA Trax" in 2002. Defendant further admits that the article referenced in paragraph 12 includes quotes that are purportedly attributed to Steve Schnur.

13. Defendant denies the allegations contained in paragraph 13, but admits that Defendant has included songs in its games before the songs were commercially released apart from the games. Defendant further admits that it has commissioned artists to create songs to include in games.

14. Defendant denies the allegations contained in paragraph 14, but admits that the article referenced in paragraph 14 includes quotes that are purportedly attributed to Steve Schnur. Defendant further admits that in the introduction of some games, a song is synchronized to the game visual introduction. Defendant further admits that in some of its games, a "chyron" listing the artist's name, song title and album name appears on the screen at the beginning of a song. Defendant further admits that, in some of its games, the player is able to select particular songs to hear during the game play.

15. Defendant denies the allegations contained in paragraph 15, but admits that the article referenced in paragraph 15 includes a quote that is purportedly attributed to Wil Mozell. Defendant further admits that the game *NBA Street Vol. 2* includes a song by the artist Nelly. Defendant further admits that the online magazine "Intensity" posted an article entitled "NBA Street Vol. 2 Soundtrack List Revealed!," which purports to list the songs included in the game.

16. Defendant denies the allegations contained in paragraph 16, but admits that it included a compact disc with its game *NBA Live 2003*. Defendant further admits that the article referenced in paragraph 16 includes a quote that is purportedly attributed to Steve Schnur.

17. Defendant denies the allegations contained in paragraph 17, but admits that it has a website at www.ea.com (the "EA Website"). Defendant further admits that some of the song titles and artists included in some of its games are listed on the EA Website. Defendant further admits that Internet users can listen to samples of some of the songs included in EA's games on the EA Website. Defendant further admits that it has distributed promotional DVDs and CD-ROMs that include songs synchronized to game visuals at industry trade shows.

18. Defendant denies the allegations contained in paragraph 18.

19. Defendant denies the allegations contained in paragraph 19, but admits that EMI or its affiliates have granted permission to EA to use musical compositions, including *Chapter Four, Action (f/k/a Feelin' This), Mayhem, I Hate Everything About You, Little Know It All, Nothing Sacred, Blueside, Bonethrower, Game Time, I Got It Poppin', Live Like Me, Top of the Game, Love and War, Get It To Go, Surfacing, Walkie Talkie Man, Crank It Up, Victory, Fightin' in the Club, Hyphy, Ja Sei Namorar, Take A Ride, Mas, Rock Star, Wobble, If I Could Go,* and *Too Hood*. Defendant also admits that it received permission to use the following musical compositions: *Burn Burn, Ride,* and *Last Train Home.* Defendant lacks knowledge or information sufficient to form belief as to the truth of the allegations contained in last sentence of paragraph 19 and, on that basis, denies them.

20. Defendant denies the allegations contained in paragraph 20. Defendant further denies knowledge or information sufficient to form belief as to the truth of the allegations that EMI contacted authors of certain musical compositions and the allegations regarding the authors' and EMI's share of certain musical compositions.

21. Defendant denies the allegations contained in paragraph 21, but admits that it first released *Madden NFL 2004* on or about August 11, 2003; *NASCAR Thunder 2004* on or about September 16, 2003; *Tiger Woods PGA Tour 2004* on or about September 22, 2003; *NHL 2004* on or about September 22, 2003; *NBA Live 2004* on or about October 14, 2003; *FIFA 2004* on or about November 3, 2003; *Need for Speed: Underground* on or about November 17, 2003; *EA NFL Street* on or about January 13, 2004; *MVP Baseball 2004* on or about March 9, 2004, and *EA SPORTS Fight Night 2004* on or about April 5, 2004. Defendant admits that these games incorporate certain musical compositions that are at issue here.

22. Defendant denies the allegations contained in paragraph 22, but admits that EA has sold more than 1 million units of *Madden NFL 2004; NBA Live 2004; Tiger Woods PGA Tour 2004; Need For Speed: Underground;* and *FIFA 2004.* Defendant further admits that EA has sold over 100,000 units of *NASCAR Thunder 2004; NHL 2004; MVP Baseball 2004; EA SPORTS Fight Night 2004*; *SSX Volume 3; NBA Live 2003;* and *NFL Street*.

23. Defendant denies the allegations contained in paragraph 23, but admits that Internet users can listen to portions of certain songs included in EA's games on the EA Website.

24. Defendant denies the allegations contained in paragraph 24, but admits that certain compositions have been included in materials to promote EA products.

25. Defendant denies the allegations contained in paragraph 25, but admits that, on February 12, 2004, Gina Ferranti, Coordinator of Music Licensing at Electronic Arts (Canada), Inc., faxed Keith D'Arcy of EMI Music Publishing a list of songs which EMI or its affiliates had granted permission to EA to use, but for which EA expected to receive from EMI long-form agreements.

26. Defendant denies the allegations contained in paragraph 26.

27. Defendant denies the allegations contained in paragraph 27, but admits that counsel for EMI Music Publishing sent a letter, dated March 5, 2004, to counsel for Defendant.

28. Defendant states that the allegations contained in paragraph 28 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

29. Defendant denies the allegations contained in paragraph 29.

30. Defendant denies the allegations contained in paragraph 30, but admits that certain videogame consoles allow gamers, who have installed game software onto their

videogame consoles, to play certain games (including certain EA games) against each other from remote locations. Defendant lacks knowledge or information sufficient to form belief as to the truth of the allegations contained in last sentence of paragraph 30 and, on that basis, denies them.

31. Defendant denies the allegations contained in paragraph 31.

32. Defendant denies the allegations contained in paragraph 32.

33. Defendant denies the allegations contained in paragraph 33, but admits paragraph 33 purports to quote (albeit incompletely) from certain long-form agreements between EMI or its affiliates.

34. Defendant denies the allegations contained in paragraph 34.

35. Defendant denies the allegations contained in paragraph 35.

36. Defendant denies the allegations contained in paragraph 36.

37. Defendant denies the allegations contained in paragraph 37.

FIRST CAUSE OF ACTION

38. Defendant incorporates its responses to the allegations contained in paragraphs 1-37 of the Amended Complaint as if fully set forth herein.

39. Defendant denies the allegations contained in paragraph 39.

40. Defendant denies the allegations contained in paragraph 40.

41. Defendant states that the allegations contained in paragraph 41 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

42. Defendant denies the allegations contained in paragraph 42.

43. Defendant denies the allegations contained in paragraph 43.

44. Defendant states that the allegations contained in paragraph 44 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

45. Defendant states that the allegations contained in paragraph 45 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

46. Defendant states that the allegations contained in paragraph 46 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

47. Defendant states that the allegations contained in paragraph 47 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

48. Defendant states that the allegations contained in paragraph 48 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

SECOND CAUSE OF ACTION

49. Defendant incorporates its responses to the allegations contained in paragraphs 1-38 of the Amended Complaint as if fully set forth herein.

50. Defendant denies the allegations contained in paragraph 50.

51. Defendant denies the allegations contained in paragraph 51.

52. Defendant states that the allegations contained in paragraph 52 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

53. Defendant denies the allegations contained in paragraph 53.

54. Defendant denies the allegations contained in paragraph 54.

55. Defendant states that the allegations contained in paragraph 55 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

56. Defendant states that the allegations contained in paragraph 56 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

57. Defendant states that the allegations contained in paragraph 57 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

58. Defendant states that the allegations contained in paragraph 58 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

59. Defendant states that the allegations contained in paragraph 59 are conclusions of law as to which no response is necessary, but that to the extent any response is required, denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

1. Plaintiffs' claims are barred by the doctrine of estoppel.

2. Plaintiffs' claims are barred by the doctrine of acquiescence.

3. Plaintiffs' claims are barred by the doctrine of laches.

4. Plaintiffs' claims are barred by the doctrine of unclean hands.

5. Plaintiffs' claims are barred by the doctrine of unjust enrichment.

6. Plaintiffs' claims are barred by the doctrine of waiver.

7. Plaintiffs' claims fail to state a claim upon which relief may be granted.

8. Plaintiffs' claims are barred by the doctrine of copyright misuse.

9. Plaintiffs' claims are barred because of lack of standing.

10. Plaintiffs' claims are barred by the doctrine of consent.

11. Plaintiffs' claims are barred by the doctrine of ratification.

PRAYER FOR JUDGMENT

WHEREFORE, Defendant prays for judgment against Plaintiffs as follows:

1. That Plaintiffs' Amended Complaint be dismissed with prejudice, and that Plaintiff take nothing thereby;

2. That Defendant be awarded its costs of incurred herein;

3. That Defendant be awarded its attorneys' fees in accordance with 17 U.S.C. § 505, the federal common law, or otherwise; and

4. That Defendant be granted such other and further relief as the Court may deem just and proper.

Dated: June 25, 2004
New York, New York

O'MELVENY & MYERS LLP

By: s/ Johanna Schmitt
Dale Cendali (DC 2676)
Johanna Schmitt (JS 2125)
Times Square Tower
7 Times Square
New York, New York 10036
Tel: (212) 326-2000 Fax: (212) 326-2061

Attorneys for Defendant Electronic Arts Inc.

CERTIFICATE OF SERVICE

I, Johanna Schmitt, hereby certify that on June 25, 2004, I caused **Defendant Electronic Arts Inc.'s Answer To Plaintiffs' Amended Complaint** to be served upon plaintiffs' counsel by personally delivering true copies of the aforementioned documents, enclosed in properly addressed postpaid wrappers, into an official depository under the exclusive care and custody of the United States Postal Service within the State of New York to the addresses indicated below:

L. Peter Parcher, Esq.
Manatt, Phelps & Phillips, LLP
500 Fifth Avenue
New York, New York 10110

s/ Johanna Schmitt

NY1:1519695